IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

NO. 54, ORIGINAL

* * *

**UNITED STATES OF AMERICA,**
Plaintiff

v.

**STATES OF FLORIDA AND TEXAS,**
Defendants

* * *

## DEFENDANTS' EXCEPTION TO REPORT OF SPECIAL MASTER ON MOTION OF DEFENDANTS FOR LEAVE TO FILE A COUNTERCLAIM

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# DEFENDANTS' EXCEPTION TO REPORT OF SPECIAL MASTER ON MOTION OF DEFENDANTS FOR LEAVE TO FILE A COUNTERCLAIM

* * *

The Report of the Special Master, Honorable Olin Hatfield Chilson, on Motion of Defendants for Leave to File a Counterclaim, was filed herein on April 19, 1976. The parties were allowed 45 days within which to file their exceptions, if any, thereto. The States of Florida and Texas, defendants herein, except to that portion of the Special Master's Report wherein it is recommended that leave to file a counterclaim be denied because of the sovereign immunity of the United States. The defendant States accept and urge approval of that portion of the Report wherein the Special Master finds that, apart from the issue of sovereign immunity, the issue raised in defendant's counterclaim should be litigated in one unified proceeding along with that raised by the United States' complaint.

## EXCEPTION

THE SPECIAL MASTER ERRED IN RECOMMENDING THAT DEFENDANTS' COUNTERCLAIM BE BARRED BY THE SOVEREIGN IMMUNITY OF THE UNITED STATES.

## STATEMENT

This lawsuit was commenced in March 1972 when the United States, by leave of Court, filed its complaint against the States of Florida and Texas, praying that this Court enter a decree declaring that neither of the defendant States has any right to control fishing by foreign vessels or their crews in the sea *more than* three geographical miles from their coasts.

In May 1972 the Defendants answered, denying that they lacked any authority over fishing by foreign nationals in the geographical area referred to in the United States' complaint. and affirmatively asserting that they possessed those rights within their recognized boundaries of three marine leagues (nine geographical miles) in the Gulf of Mexico.

In June and September of 1974, the United States, by answers to interrogatories and through deposition testimony of high Department of State officials, took the position that the defendant States lack any authority to control fishing by foreign vessels or their crews *at any point* seaward of their shorelines, not merely beyond three geographical miles therefrom. The United States thereby for the first time stated that it regards the issue of jurisdiction over fishing by foreign vessels as *one* subject matter as to all areas seaward of the coastline. It declared beyond any doubt its official position that the defendant States lack any authoirity to control such fishing at any point off their coastlines, and that it does

not distinguish between the States' authority within three geographical miles and more than three geographical miles from shore. Hence it became apparent that the United States' complaint deals with only a part of what it deems one unified subject matter over which the parties hereto strongly disagree.

Between September 1974 and January 1975, the defendants made every reasonable effort to remove the issue of their authority over fishing by foreign vessels and their crews within three geographical miles of their shores from this lawsuit by agreement among the parties.[1] Those efforts proving unsuccessful, in July 1975 defendants filed a joint Motion for Leave to File Counterclaim wherein they seek the following relief:

> WHEREFORE, in order to avoid the strong probability of future, unnecessary litigation involving the authority of the States of Florida and Texas to control fishing by foreign vessels and their crews within three geographical miles seaward of their shorelines, the States of Florida and Texas request that a decree be entered declaring that the Defendant States have the right and authority to control fishing by foreign vessels or their crews in the sea within three geographical miles seaward of their coastlines.

In September 1975 the United States filed its Opposition to Defendants' Motion for Leave to File Counterclaim, alleging that sovereign immunity bars

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[1]The manner in which the subject matter of defendants' counterclaim arose and their attempt to amicably remove it from this lawsuit are more fully set out in Defendants' Brief in Support of Motion for Leave to File Counterclaim and Appendices A and B thereto.

the filing of defendants' counterclaim and that the issue defendants seek to reaise is not ripe for adjudication.

On March 4, 1976 the Special Master, Honorable Olin Hatfield Chilson, made his Report on the Motion of Defendants for Leave to File Counterclaim. The Special Master recommends that this Court deny Defendants' Motion for Leave to File Counterclaim on the grounds that it is barred by the doctrine of sovereign immunity. He further recommends that, if the Court determines that the counterclaim is not barred by sovereign immunity, expeditious and orderly procedure would dictate that the motion be granted

## EXCEPTION

THE SPECIAL MASTER ERRED IN RECOMMENDING THAT DEFENDANTS' COUNTERCLAIM BE BARRED BY THE SOVEREIGN IMMUNITY OF THE UNITED STATES.

## SUMMARY OF ARGUMENT

In this case the United States seeks to invoke the doctrine of sovereign immunity in a factual situation that has never been passed upon by the Court. To bar defendants' counterclaim because of the United States' immunity would represent the most extreme extension of that doctrine imaginable. By their counterclaim, defendants merely seek to bring before the Court for adjudication one unified, integrated subject matter; to refuse leave to file defendants' counterclaim would prevent full justice from being done herein.

## ARGUMENT

While opinions by this Court and inferior courts have stated that the United States is not subject to suit

without its consent, there has been very little judicial discussion of the reasons or principles behind the doctrine. *See, e.g., Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 388 (1939); *United States v. Lee*, 106 U.S. 196 (1882); *United States v. McLemore*, 4 How. 286 (U.S. 1846). Analysis of cases stating the doctrine reveals three rational, as opposed to dogmatic, justifications for the United States' immunity. Although interrelated and sometimes overlapping, the three rationales may be summarized as follows:

(1) The United States should not, without its consent, be required to expend public monies. *See, e.g., United States v. Shaw*, 309 U.S. 495 (1940); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).

(2) The United States should not be compelled judicially to deal with public property in a particular way. *See, e.g., Hawaii v. Gordon*, 373 U.S. 57 (1963); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); and

(3) To judicially dictate to the United States that it must or must not act in a certain way would intolerably interfere with public administration. *See, e.g., Hawaii v. Gordon, supra; Dugan v. Rank*, 372 U.S. 609 (1963).

In no reported case has the doctrine been invoked where, as here, the relief sought by the party opposing the United States would not even allegedly result in any of the results found objectionable in the cases referred to above. Defendants here seek merely to obtain a complete and full declaration of the respective rights of the parties to control foreign fishing off their shores. Not one cent of public money would be required to be spent by such a declaration. Defendants do not seek to dictate to the United States how to deal with any public

property, nor to enjoin it from any use or disposition of such property. Finally, and most significantly, defendants do not seek to compel or enjoin any act by the United States or any of its officials or employees. Not the slightest interference with public administration could result from the declaration defendants seek. Defendants do not ask for a declaration that they have exclusive enforcement rights within three miles from their coastlines. No contention is made that the United States should be excluded from enforcement activities within any area, or interfered with in the slightest way in its conduct thereof.

It is apparent that a judgment on the United States' complaint herein could adverssely affect the interests of the defendant States in the subject matter of their counterclaim, since the United States' position is that success on their complaint *ipso facto* denies the defendants' rights to enforce fishing laws against foreign vessels at any point off their coasts. Given this stated position of the United States, it would be unfair for it to avoid directly litigating herein the issue raised by defendants' counterclaim.

The rights of the defendant States with respect to fishing by foreign vessels off their coasts is one subject matter from the shore seaward to their recognized boundaries. This is demonstrated not only by the United States' position referred to above, but by physical practicalities. No signs or other landmarks divide the area within three miles of the shores of Texas and Florida in the Gulf of Mexico from the area seaward thereof. Adjudication of only the United States' complaint could result in a piecemeal declaration of rights that leaves the rights of defendants in hopeless confusion.

In the final analysis, the United States does not oppose the filing of defendants' counterclaim because of

any alleged danger that embarrassment, incumbrance, or expenditure could result therefrom. Rather, it opposes filing simply because it does not, for reasons thus far best known to itself, choose to reach the counterclaim's merits at this time and in this suit. Contrary to the absolutist position taken by the United States herein, sovereign immunity has not proved an utterly impenetrable barrier to decision on the merits in every case to which the United States has been a party. Where justice required, courts have refused to close their eyes to the facts and have allowed the adjudication of issues raised by parties in suits brought by the United States.

In *United States v. The Thekla*, 266 U.S. 328 (1924), a collision case in admiralty, the United States stood as libellant. A cross libel was filed, and the district court found in favor of the cross libellant for damages. The United States sought to escape liability, asserting its sovereign immunity. In language that transcends the case's admiralty setting, this Court, through Mr. Justice Holmes, wrote as follows:

> When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter.
>
> The reasons that have prevailed against creating a government liability in tort do not apply to a case like this, and on the other hand the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. . . *Id.* at 339-41

Recovery against the United States on the cross libel was allowed.

The Sepcial Master in his Report quotes from *United States v. Shaw, supra,* wherein this Court stated:

> There is little indication in the facts or language of *The Thekla* to indicate an intention to permit unlimited cross-claims. *Id.* at 503

Defendants do not here claim a right to "unlimited cross-claims" when the United States brings suit.[2] But where, as here, justice would be denied by a mechanical, uncritical application of the doctrine of sovereign immunity, and when no public interest would be subverted by a determination of a counterclaim, Mr. Justice Holmes' words forcefully apply. Under the unique facts of this case, the adjudication of defendants' counterclaim is essential if full justice is to be done.

Courts on the Circuit level have not viewed *The Thekla's* teaching as applying only to admiralty or collision cases. Fundamental fairness has prevented courts from allowing the United States to come into court as plaintiff and thereafter avoiding the just concerns of other parties. Those parties have been allowed their day in court over the United States' invocation of sovereign immunity. *See United States v. Martin,* 267 F.2d 764 (10th Cir. 1959)[United States not allowed to invoke sovereign immunity to bar counterclaim in water rights adjudication it initiated]; *Jacobs v. United States,* 239 F.2d 459 (4th Cir.), *cert. denied,* 353 U.S. 904, *rehearing denied,* 353 U.S. 952

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[2]The defendants are not herein launching a frontal assault on the doctrine of sovereign immunity. Their counterclaim herein may and should be allowed even though there may be legitimate areas for its continuing viability.

(1956) [United States may not invoke sovereign immunity to avoid making payments due on contract when its sues for return of contract documents]; *Lacy v. United States*, 216 F.2d 223 (5th Cir. 1954) [United States cannot prevent full adjudication of issues between the parties when it files injunction suit involving real estate.] *See also United States v. Briggs*, 514 F.2d 794, 808 (5th Cir. 1975) [United States cannot by sovereign immunity avoid suit to have plaintiffs' names expunged from grand jury report.]

The United States flatly denies that the defendant States have any right to control foreign fishing at any point of their coasts, viewing the issue of the parties' respective jurisdictions as one subject matter to which they contend the same rules of law apply. Defendants by their counterclaim merely attempt to bring before this Court the entire subject matter in controversy as acknowledged by the United States. Leave to file that counterclaim should not be denied because of the United States' arrogant assertion of the doctrine of sovereign immunity.

## CONCLUSION

For the foregoing reasons, defendants, the States of Florida and Texas, pray that the Report of the Special Master on Motion of Defendants for Leave to File a Counterclaim be accepted insofar as the Special Master recommends that, except for the issue of United States' sovereign immunity, the issue raised by defendants' counterclaim should be litigated in one unified proceeding with those raised in the United States' claim. The defendants pray that leave of court to file their counterclaim not be denied by reason of the United States' sovereign immunity.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Lee C. Clyburn, Assistant Attorney General of the State of Texas, and a member of the Bar of the Supreme Court of the United States, do hereby certify that three conformed copies of the foregoing Exception to Report of Special Master on Motion of Defendants for Leave to File a Counterclaim were on the _____ day of June, 1976, forwarded to the Special Master, and to the Office of the Solicitor General of the United States, by placing conformed copies of same in the United States mail, first class mail, postage prepaid.

LEE C. CLYBURN